Supreme Court, U.S.
FILED

(1) 961843 MAY 19 1997

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID L. SMITH,

Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT; THE TENTH CIRCUIT DISCIPLINARY PANEL; THE HONORABLE STEPHANIE K. SEYMOUR, Chief Judge of the Tenth Circuit and Chairman of the Tenth Circuit Disciplinary Panel; THE HONORABLE BOBBY R. BALDOCK, Tenth Circuit Judge and Member of the Tenth Circuit Disciplinary Panel; and THE HONORABLE WADE BRORBY, Tenth Circuit Judge and Member of the Tenth Circuit Disciplinary Panel;

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. SMITH

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52 pp

QUESTIONS PRESENTED FOR REVIEW

Whether by issuing her (February 18, 1997) order denying Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241; Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255; and Motion for a Stay of State Court Proceedings Pursuant to 28 U.S.C. § 2251 without granting a hearing or considering the issues raised and argued therein, Chief Judge Seymour has deprived him of his Fifth Amendment due process right to a full and fair opportunity (or any opportunity) to litigate the constitutional validity of the (February 13, 1996) order of disbarment issued by the Tenth Circuit Disciplinary Panel.

Whether by issuing their (May 8, 1997) order denying Mr. Smith's Petition for a Writ of Mandamus or Prohibition with respect to the letter refusal by the Clerk and Chief Deputy Clerk of the Tenth Circuit to accept for filing his Notice of Appeal of Chief Judge Seymour's (February 18, 1997) order, Circuit Judges Ebel and Briscoe have deprived him of his statutory right to appeal this order to the Tenth Circuit.

Whether under the circumstances of this case, the judges of the Tenth Circuit have not only demonstrated further their bias and prejudice against Mr. Smith, in violation of his Fifth Amendment due process right to a fair and impartial decisionmaker; they have suspended the privilege of the Writ of Habeas Corpus, in violation of Article I, Section 9 of the Constitution of the United States.

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CITATIONS OF OPINIONS AND ORDERS

In re Smith, 10 F.3d 723 (10th Cir. 1993) (Seymour, Chief Judge, Baldock and Brorby, Circuit Judges), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994).

In re Smith, 76 F.3d 335 (10th Cir. 1996) (Seymour, Chief Judge, Baldock and Brorby, Circuit Judges), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996).

In re Smith, Order (10th Cir. February 18, 1997) (Seymour, Chief Judge).

In re Smith, Order (10th Cir. March 7, 1997) (Seymour, Chief Judge, Baldock and Brorby, Circuit Judges).

In re Smith, Letter (10th Cir. March 21, 1997) (Fisher, Clerk, Shumaker, Chief Deputy Clerk).

In re Smith, Order (10th Cir. May 8, 1997) (Ebel and Briscoe, Circuit Judges).

JURISDICTION

The orders sought to be reviewed were entered on February 18, 1997 and May 8, 1997. Rehearing of the (February 18, 1997) order was denied by order dated March 7, 1997.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the orders in question is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED IN THE CASE

Art. I, Sec. 9, U.S. Consti.

28 U.S.C. § 2241

28 U.S.C. § 2251

28 U.S.C. § 2253

28 U.S.C. § 2255

See the Appendix hereto for the full text of the constitutional provision and statues involved in the case.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On February 13, 1996, the three-judge Disciplinary Panel of the United States Court of Appeals for the Tenth Circuit (composed of Seymour, Chief Judge, and Baldock and Brorby, Circuit Judges) issued its order disbarring Mr. Smith from the practice of law in the Tenth Circuit. See In re Smith, 76 F.3d 335 (10th Cir. 1996), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996). The Tenth Circuit Disciplinary Panel disbarred Mr. Smith based on his alleged violation of its (November 29, 1993) order indefinitely suspending him from the practice of law in the Tenth Circuit,[1] and for allegedly

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[1]In its (November 29, 1993) order, the Tenth Circuit Disciplinary Panel indefinitely suspended Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals in four federal civil rights cases, and for his failure to comply with court orders to pay more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado. See In re Smith, 10 F.3d 723 (10th Cir. 1993), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and

practicing law in the Tenth Circuit without authorization.

On February 18, 1997, Chief Judge Seymour issued her order denying Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241; Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255; and Motion for a Stay of State Court Proceedings Pursuant to 28 U.S.C. § 2251 without granting a hearing or considering the issues raised and argued therein.

On May 8, 1997, Circuit Judges Ebel and Briscoe issued their order denying Mr. Smith's Petition for a Writ of Mandamus or Prohibition with respect to the letter refusal by Patrick Fisher, Clerk of the United States Court of Appeals for the Tenth Circuit, and Elisabeth A. Shumaker, Chief Deputy Clerk, to accept for filing his Notice of Appeal of Chief Judge Seymour's (February 18, 1997) order.

II. ARGUMENT

Because the disciplinary sanctions imposed against Mr. Smith (i.e., disbarment) by the Tenth Circuit Disciplinary Panel were "punitive, to vindicate the authority of the court," rather than "remedial, and for the benefit of the complainant," they were criminal rather than civil in nature. See International Union v. Bagwell, ____

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the U.S. District Court has been "satisfied."

U.S. ____, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994), quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911); see also In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature). Mr. Smith was therefore entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit Disciplinary Panel. See Bagwell, supra, 114 S.Ct., at 2560, citing Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767 (1925), and Hicks v. Feiock, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988); see also Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968). Further, as a matter of equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because he was convicted and punished by the Tenth Circuit Disciplinary Panel in attorney disciplinary proceedings rather than in criminal contempt proceedings.

At the very least, Mr. Smith was entitled to fair notice of the charges being brought against him by the Tenth Circuit Disciplinary Panel and an adequate opportunity to be heard with respect to those charges before entry of a final judgment. See In re Ruffalo, supra; Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Cleveland Board of Education v.

Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985). However, despite Mr. Smith's request to be heard in person in defense and mitigation, and for a hearing, at which he would have the opportunity to present expert testimony and other relevant evidence,[2] the Tenth Circuit Disciplinary Panel limited his opportunity to be heard to his verified response to its order to show cause--a blatant and egregious violation of Fed. R. App. P. 46, which provides in pertinent part as follows:

> (b) Suspension or Disbarment.--When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension

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[2]In his response to the Tenth Circuit Disciplinary Panel's order to show cause, Mr. Smith requested to be heard in person in defense and mitigation pursuant to Section 8.1 of the Plan for Attorney Disciplinary Enforcement and Fed. R. App. P. 46(c). Mr. Smith specifically requested an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence.

> or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.
>
> (c) Disciplinary Power of the Court Over Attorneys.--A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.
>
> [Emphasis added.]

By refusing to grant Mr. Smith's request for the evidentiary hearing required by Fed. R. App. P. 46, and by convicting him for practicing law in the Tenth Circuit without authorization--an alleged offense not charged in the order to show cause--the Tenth Circuit Disciplinary Panel deprived him of his Fifth Amendment due process right to fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of

a final judgment.

Initially, the Tenth Circuit Disciplinary Panel ordered Mr. Smith to show cause in writing why he should not be disciplined for "ghost-writing" the briefs in question. However, when Mr. Smith filed his verified response stating that he had never participated in the writing of a brief for a pro se litigant without disclosing his participation, and had never refused to sign a brief that he had written when requested to do so by any court, the Tenth Circuit Disciplinary Panel acquitted him on the charge of "ghost-writing" the briefs in question, but ordered him to show cause in writing why he should not be disbarred for "(1) writing briefs on behalf of third parties while under indefinite suspension, and (2) for violating this court's November 29, 1993 order." By convicting Mr. Smith on these charges, which were based on the same conduct for which he had previously been acquitted on the charge of "ghost-writing" the briefs in question, the Tenth Circuit Disciplinary Panel twice put him "in jeopardy of life or limb" for the same offense, in violation of the Fifth Amendment to the Constitution of the United States.

Mr. Smith was entitled to have his case heard and decided by a fair and impartial decisionmaker. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due

process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). However, because of its (November 29, 1993) order imposing harsh and unjustified discipline against Mr. Smith without giving him a full criminal process (including his Sixth Amendment right to a jury trial), or at the very least, fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment, the Tenth Circuit Disciplinary Panel's fairness and impartiality might reasonably be questioned. Id. The Tenth Circuit Disciplinary Panel was therefore obligated to disqualify itself from the disciplinary proceedings against Mr. Smith. See 28 U.S.C. § 455(a), which provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality

might reasonably be questioned.

See also Liteky v. United States, ____ U.S. ____, 114 S.Ct. 1147, ____ L.Ed.2d ____ (1994). By failing or refusing to disqualify itself from the disciplinary proceedings against Mr. Smith, the Tenth Circuit Disciplinary Panel deprived him of his Fifth Amendment due process right to have his case heard and decided by a fair and impartial decisionmaker. Further, by refusing to address Mr. Smith's complaints of judicial misconduct pursuant to 28 U.S.C. § 372(c), the Tenth Circuit Disciplinary Panel grossly abused its discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice.

Mr. Smith was entitled to effective review of the validity of the Tenth Circuit Disciplinary Panel's (November 29, 1993) suspension order before being convicted and punished for allegedly violating this order.[3] See Walker v.

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[3]The Tenth Circuit Disciplinary Panel's (November 29, 1993) suspension order was transparently invalid. In at least one of the cases underlying this order, Casillan v. RTD, et al., a three-judge Hearing Panel of the Tenth Circuit issued its unpublished order imposing harsh and unjustified sanctions against Mr. Smith for filing an alleged "frivolous" appeal without giving him prior notice that sanctions were being considered or an adequate opportunity (or any opportunity) to file a brief or

otherwise respond before sanctions were imposed, in violation of his Fifth Amendment right to due process of law. Further, the Tenth Circuit Disciplinary Panel refused to permit Mr. Smith to argue that his appeals of U.S. District Court sanction orders were not "frivolous," holding that this issue was foreclosed by "circuit precedent," a reference to previous unpublished orders imposing harsh and unjustified sanctions against Mr. Smith. However, this refusal was not only contrary to 10th Cir. R. 36.3., which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel." [Emphasis added.] This refusal also prevented Mr. Smith from arguing that because there was a split in the federal circuits on the issues involved in his appeals, or because his appeals were good faith arguments for the extension, modification or reversal of existing law, or for the establishment of new law, the Tenth Circuit's unpublished orders sanctioning him for filing these appeals were void ab initio. See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent). Finally, this refusal created an

City of Birmingham, 388 U.S. 307, 318-20, 87 S.Ct. 1824, 1831-32, 18 L.Ed.2d 1210 (1967); United States v. Ryan, 402 U.S. 530, 532, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971). Mr. Smith was also entitled to effective review of the validity of the disciplinary sanctions (i.e., disbarment) imposed against him by the Tenth Circuit Disciplinary Panel. See Honda Motor Co., Ltd. v. Oberg, ____ U.S. ____, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). By arbitrarily refusing to provide effective review of the validity of the Tenth Circuit Disciplinary Panel's (November 29, 1993) suspension order before convicting and punishing Mr. Smith for allegedly violating this order, and by arbitrarily refusing to provide effective review of the validity of the disciplinary sanctions (i.e., disbarment) imposed against him by the Tenth Circuit Disciplinary Panel, the Tenth Circuit

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irrebuttable presumption of guilt that deprived Mr. Smith of his Fifth Amendment right to due process of law. Under these circumstances, Mr. Smith did not have a full and fair opportunity to litigate the issue of whether he had filed "frivolous" appeals in the underlying cases cited in the order to show cause, and the Tenth Circuit Disciplinary Panel erred by refusing to permit him to litigate this issue in the disciplinary proceedings it brought against him. As the result of this refusal, Mr. Smith was reduced to begging for mercy from the consequences of the Tenth Circuit's transparently invalid orders.

deprived him of his Fifth Amendment right to due process of law.

In order to convict and punish Mr. Smith for allegedly violating its (November 29, 1993) suspension order and practicing law in the Tenth Circuit without authorization, the Tenth Circuit Disciplinary Panel was required to prove beyond a reasonable doubt that Mr. Smith entered his appearance on behalf of his clients in the appeals in question or otherwise held himself out as an attorney entitled to practice law in the Tenth Circuit. In two of the appeals in question, Mr. Smith's clients entered their appearances as pro se plaintiffs-appellants and filed briefs which included notes disclosing the fact that their briefs had been prepared with the assistance of their attorney, David L. Smith.[4] In the other two appeals in question, Mr. Smith's clients entered their appearances as pro se plaintiffs-appellants, but because of Mr. Smith's personal stake in the issues being appealed, he also entered his appearance in these appeals as a pro se attorney-appellant.[5] Mr. Smith and his clients

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[4]This disclosure was made in order to be completely above board and to avoid any possibility that Mr. Smith could or would be charged with "ghost-writing" his clients' briefs.

[5]Mr. Smith was the attorney of record for the plaintiffs-appellants in their federal civil rights cases in the United States District Court for the

filed joint briefs in these appeals. However, in none of the appeals in question did Mr. Smith enter his appearance on behalf of his clients or otherwise hold himself out as an attorney entitled to practice law in the Tenth Circuit. In the absence of proof beyond a reasonable doubt that he did, Mr. Smith should not have been convicted for violating the Tenth Circuit Disciplinary Panel's (November 29, 1993) suspension order and practicing law in the Tenth Circuit without authorization. By ignoring these and the other defenses raised by Mr. Smith in his response to its order to show cause, the Tenth Circuit Disciplinary Panel deprived him of his Fifth Amendment due process right to present a defense to the charges being brought against him. See Cooke v. United States, supra.

Upon information and belief, no other attorney has ever been prosecuted, tried, convicted or punished, much less disbarred, by the Tenth Circuit Disciplinary Panel for the type of misconduct (if any) involved in this case. The discipline imposed against Mr. Smith by the Tenth Circuit Disciplinary

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District of Colorado, and he had a moral, ethical and contractual obligation to assist them with their appeals to the Tenth Circuit of the case stays, jury trial cancellations, counsel removals, monetary sanctions and other harsh and unjustified punitive actions taken against him and them by the U.S. District Court.

Panel is so excessive and so disproportionate in comparison to the seriousness of any misconduct committed by him as to amount to Eighth Amendment "cruel and unusual" punishment. See Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); see also Browning-Ferris Industries v. Kelco, 429 U.S. 257, 109 S.Ct. 2909, 2923-34, 106 L.Ed.2d 219 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part). Further, by disciplining Mr. Smith for writing briefs and otherwise assisting his clients with their appeals from the U.S. District Court to the Tenth Circuit, the Tenth Circuit Disciplinary Panel punished him for engaging in activities protected by his and his clients' First Amendment right to freedom of speech and association, and to petition the government for a redress of grievances. See, e.g., NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76

L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("[a] public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Alldredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981); Shaw v. Neece, 727 F.2d 947, 948 (10th Cir. 1984); McKay v. Hammock, 730 F.2d 1367, 1375 (10th Cir. 1984); Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985); Ward v. Fort, 762 F.2d 856, 858 (10th Cir. 1985). This was especially true for Mr. Smith's clients, who were incompetent to proceed pro se, and were financially unable to hire substitute counsel to replace Mr. Smith, who was pursuing their federal civil rights cases on a contingent fee basis before he was disbarred from the practice of law in the United States Court of Appeals for the Tenth Circuit without being afforded a due process evidentiary hearing.

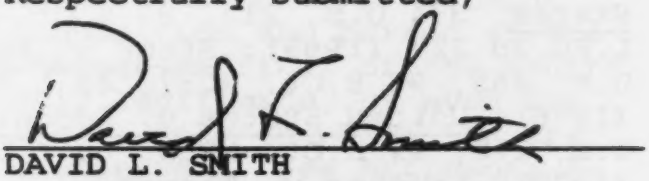
Mr. Smith appears to be the victim of the current "professionalism crusade," in which "heretical lawyers" who commit themselves to roles other than "officer

of the court" are hunted down, brought before the Inquisition and burned at the stake, even though "officer of the court" is not the only legitimate, or even the most traditional, role to which lawyers may commit themselves. See Atkinson, A Dissenter's Commentary on the Professionalism Crusade, 74 TEX. L. REV. 259 (1995). As Mr. Smith sees it, his primary role is not to be "officer of the court." His primary role is to be a zealous advocate of his clients' civil rights interests within the bounds of the law. Because the Tenth Circuit Disciplinary Panel has convicted and punished Mr. Smith for fulfilling this ethical obligation to his clients, the misconduct proved against him (if any) warrants that a substantially different form of discipline (including no discipline) be imposed.

By issuing her (February 18, 1997) order denying Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241; Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255; and Motion for a Stay of State Court Proceedings Pursuant to 28 U.S.C. § 2251 without granting a hearing or considering the issues raised and argued therein, Chief Judge Seymour has deprived him of his Fifth Amendment due process right to a full and fair opportunity (or any opportunity) to litigate the constitutional validity of the (February 13, 1996) order of disbarment issued by the Tenth Circuit Disciplinary Panel. See Hill v. United States, 368 U.S. 424, 82 S.Ct. 468, 7

L.Ed.2d 417 (1962); Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969); Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); United States v. Addonizio, 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979); Lonchar v. Thomas, ____ U.S. ____, 116 S.Ct. 1293, ____ L.Ed.2d ____ (1996). Further, by issuing their (May 8, 1997) order denying Mr. Smith's Petition for a Writ of Mandamus or Prohibition with respect to the letter refusal by the Clerk and Chief Deputy Clerk of the Tenth Circuit to accept for filing his Notice of Appeal of Chief Judge Seymour's (February 18, 1997) order, Circuit Judges Ebel and Briscoe have deprived him of his statutory right to appeal this order to the Tenth Circuit. See 28 U.S.C. § 2253. Under these circumstances, the judges of the United States Court of Appeals for the Tenth Circuit have not only demonstrated further their bias and prejudice against Mr. Smith, in violation of his Fifth Amendment due process right to a fair and impartial decisionmaker; they have suspended the privilege of the Writ of Habeas Corpus, in violation of Article I, Section 9 of the Constitution of the United States. Mr. Smith therefore requests the Supreme Court of the United States to exercise its power of supervision, to grant his Petition for Writ of Certiorari, and to grant such other and further relief as may be just under the circumstances.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, Suite 300
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(303) 534-0153

PRO SE ATTORNEY-PETITIONER

APPENDIX

In re Smith, 10 F.3d 723 (10th Cir. 1993) (Seymour, Chief Judge, Baldock and Brorby, Circuit Judges), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994) A-2

In re Smith, 76 F.3d 335 (10th Cir. 1996) (Seymour, Chief Judge, Baldock and Brorby, Circuit Judges), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996) A-5

In re Smith, Order (10th Cir. February 18, 1997) (Seymour, Chief Judge) A-9

In re Smith, Order (10th Cir. March 7, 1997) (Seymour, Chief Judge, Baldock and Brorby, Circuit Judges) A-10

In re Smith, Letter (10th Cir. March 21, 1997) (Fisher, Clerk, Shumaker, Chief Deputy Clerk) A-11

In re Smith, Order (10th Cir. May 8, 1997) (Ebel and Briscoe, Circuit Judges) A-12

Art. I, Sec. 9, U.S. Consti. A-16

28 U.S.C. § 2241 ..... A-17

28 U.S.C. § 2251 ..... A-20

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United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	

Order
Filed November 29, 1993

Before Seymour, Chief Judge, Baldock and Brorby, Circuit Judges

---

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are

bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific

Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the Court
Per Curiam

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order
Filed February 13, 1996

Before Seymour, Chief Judge, Baldock and Brorby, Circuit Judges

---

On December 14, 1995, this panel entered an order requiring respondent David L. Smith to show cause why he should not be disbarred for violating this court's November 1993 suspension order and for practicing in this court without authorization. On December 20, Mr. Smith filed his response. In ruling in this matter, the court has carefully reviewed that response, as well as the other pleadings filed to date in this disciplinary action. The court has determined that Mr. Smith's transgressions warrant disbarment.

Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions. Following

briefing and oral argument, this panel suspended Mr. Smith from practicing in the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). Approximately one year later, Mr. Smith filed a request for reinstatement. This panel denied that request. See Order Denying Reinstatement, No. 93-631, (10th Cir. July 18, 1995).

During the course of his suspension, Mr. Smith continued to file briefs in this court. In particular, the court has identified four appeals in which Mr. Smith appears to have drafted briefs on behalf of the allegedly pro se appellants. Those appeals are 94-1127, Qualls v. Regional Transportation District, 94-1130, Dunkin v. Louisiana-Pacific Corporation, 94-1317, Howard v. Mail-Well Envelope Company, and 95-1198, Seales v. Jefferson County School District R-1. The December 14 show cause order was the culmination of this court's efforts to have Mr. Smith explain his involvement in these appeals.

In his response, Mr. Smith readily admits, as he has before, that he wrote and submitted the briefs in this court following the issuance of our suspension order. He maintains, however, that those submissions are not in violation of this court's order because he signed two of the briefs in question and included footnotes admitting his involvement in the other two. He suggests that these admissions absolve him of any allegations of "ghost-writing." See Johnson v. Board of County Commrs., 868 F. Supp. 1226,

1231-32 (D. Colo. 1994)(discussing elements of ghost-writing). The argument follows that because he admits his assistance, he cannot be subject to discipline. Mr. Smith's arguments misperceive the nature of the problem.

Mr. Smith was advised, in very clear terms, that he no longer had permission to practice law in this court. He was told he could not act as an attorney for his clients or former clients. In writing and filing briefs on behalf of otherwise pro se litigants, he violated that order. This breach existed regardless of whether he signed the briefs or inserted footnotes. Following the suspension order, Mr. Smith was prohibited from helping his clients with their briefs.

Contrary to assertions made in the response, the court has been very careful to distinguish between efforts made on behalf of clients and Mr. Smith's right to appeal sanctions issues on his own behalf. The briefs in the four cases identified asked for relief which went far beyond Mr. Smith as an individual. In 94-1127, for example, the alleged "pro se" brief requests relief in the form of reversing the district court's dismissal of certain claims and remand for an expedited jury trial on the merits. The front cover of that brief asserts it is being submitted by Mr. Qualls, not David Smith. We find it disingenuous for Mr. Smith to urge that these briefs only contained arguments personal to him.

Despite repeated warnings, Mr. Smith has chosen not to heed the orders of this court. He is, therefore, disbarred. His name will be stricken from the list of attorneys allowed to practice in this court. In addition, in accordance with Fed. R. App. P. 35(b), Mr. Smith's suggestion for hearing en banc was circulated to all judges of the court in regular active service. No member of the panel or the court has requested a poll. Therefore, the suggestion for en banc hearing is denied. The request for evidentiary hearing is likewise denied. Mr. Smith is referred to the office of the Circuit Executive to file any desired judicial misconduct complaint.

Entered for the Court

Per Curiam

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	

Order
Filed February 18, 1997

Before SEYMOUR, Chief Judge

Petitioner David L. Smith's petition for writ of habeas corpus, motion to set aside or correct sentence, and motion for stay of state court proceedings are all denied.

Entered for the Court

PATRICK FISHER,
Clerk of Court

By:
Elisabeth A. Shumaker
Chief Deputy Clerk

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	

Order
Filed March 7, 1997

Before SEYMOUR, Chief Judge, BALDOCK and BRORBY, Circuit Judges

---

Petitioner David L. Smith's "Notice of Appeal, Petition for Rehearing and Motion for a Stay of State Court Proceedings" is construed as a request to rehear this court's February 18 order denying relief. As construed, the request is DENIED.

Entered for the Court

PATRICK FISHER,
Clerk of Court

By:
Elisabeth A. Shumaker
Chief Deputy Clerk

United States Court of Appeals for the
Tenth Circuit
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Chief Deputy Clerk

March 21, 1997

Mr. David L. Smith
1630 Welton Street
Suite 300
Denver, CO 80202

Re: 93-631 - David L. Smith

Dear Mr. Smith:

On March 11, 1997, we received the enclosed "Notice of Appeal". This matter is closed. The court will not accept further pleadings. Future attempted filings will be discarded without further notice.

Yours very truly,

PATRICK FISHER, Clerk

By:
Elisabeth A. Shumaker
Chief Deputy Clerk

EAS/sls
Enclosure

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	
	)	No. 97-1121
David L. Smith	)	

Order
Filed May 8, 1997

Before Ebel and Briscoe, Circuit Judges

This matter is before us for consideration of a petition for a writ of mandamus or prohibition and a motion for stay of certain state court proceedings pending appeal.

Following this court's suspension and subsequent disbarment of petitioner from practicing law before this court,[6] petitioner filed within the disbarment case, No. 93-631,[7] a document styled

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[6] In re Smith, 10 F.3d 723 (1993) (per curiam), cert. denied, 513 U.S. 807 (1994); In re Smith, 76 F.3d 335 (10th Cir.), cert. denied, 117 S.Ct. 186 (1996).

[7] Petitioner used the same case number, No. 93-631, but altered the caption to read "Smith v. United States Court of Appeals," etc. In denying the petition for writ of habeas corpus, this court has adhered to the correct caption, "In re Smith."

"Petition for A Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241; Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255; and Motion for A Stay of State Court Proceedings Pursuant to 28 U.S.C. § 2251."[8]

The habeas petition was addressed to Chief Judge Seymour. Although most of the petition was devoted to petitioner's continuing arguments that he had been wrongfully disbarred, the relief expressly sought by the habeas petition was a stay of disciplinary proceedings pending before the Colorado Supreme Court. The stay was necessary, according to petitioner, to enable the chief judge "to grant an effective remedy in this habeas corpus proceeding."

The habeas petition was denied initially by Chief Judge Seymour and on rehearing[9] by a panel of this court. Petitioner then tendered another document titled simply "Notice of Appeal," seeking yet further review of the denial of his petition for writ of habeas corpus. At that point, the court declined to accept

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[8] Petitioner cites no basis whatever for this court's jurisdiction under these statutes. There is no indication that he is in custody for purposes of any of the referenced provisions, nor is he challenging a sentence under 28 U.S.C. § 2255.

[9] Following the initial denial, petitioner filed a document styled "Notice of Appeal, Petition for Rehearing and Motion for a Stay of State Court Proceedings."

additional pleadings in case No. 93-631 and advised Mr. Smith that further attempted filings would be discarded without further notice.

Mr. Smith then filed this petition seeking an order directing the clerk to file his second notice of appeal, claiming that he is "entitled to appeal Chief Judge Seymour's final order or judgment denying his petition for a writ of habeas corpus and his motion to vacate, set aside or correct sentence to the United States Court of Appeals for the Tenth Circuit."

For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of respondent to do the action in question, and no other adequate remedy available. Hadley Memorial Hosp., Inc. v. Schweiker, 689 F.2d 905, 912 (10th Cir. 1982). Petitioner must also show that his right to the writ is "clear and indisputable." Mallard v. United States Dist. Court of the S. Dist. of Iowa, 490 U.S. 296, 309 (1989); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35-36 (1980); In re Weston, 18 F.3d 860, 864 (10th Cir. 1994).

Here, petitioner's first notice of appeal, filed February 26, 1997, was considered as a petition for rehearing and denied. This comports with the requirements of Fed. R. App. P. 27(c) (action of single judge may be reviewed by court). Petitioner is not entitled, simply because he dislikes the result, to continue litigating a case which has been

conclusively decided by this court and by filing additional notices of appeal.

Case No. 93-631 is closed. Nothing remains to be appealed. "[T]he right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious." In re Winslow, 17 F.3d 314, 315 (10th Cir. 1994), quoting Tripati v. Beaman, 878 F.2d 351, 353 (10th Cir. 1989). The same holds for continued attempts to litigate a case that is closed.

The petition for writ of mandamus is denied. In view of our disposition of the mandamus petition, the motion for stay is also denied.

Entered for the Court
PATRICK FISHER, Clerk

By
Deputy Clerk

Article I, Section 9 of the Constitution of the United States provides in relevant part as follows:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. § 2241 provides as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless--
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise

of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2251 provides as follows:

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.
>
> After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceeding or appeal were pending.

28 U.S.C. § 2253 provides as follows:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge issues a certificate of probable cause.

28 U.S.C. § 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the

court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.